

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION**

IN RE	§	
	§	
AMIR VIRANI,	§	Case No: 00-32403-BJH-7
	§	
Debtor.	§	
_____	§	
	§	
ALFONSO ALDAPE LOPEZ, et al.,	§	
	§	
Plaintiffs,	§	
v.	§	Adversary No. 00-3293
	§	
IGNACIO SANTOS DE HOYOS, et al.,	§	
	§	
Defendants.	§	

FINDINGS OF FACT AND CONCLUSIONS OF LAW

On January 9, 2001, the Court held a hearing on the Judgment Plaintiffs’ Application for Preliminary Injunction and Appointment of Receiver Regarding Fraudulent Transfers Made to Francisca De Hoyos De Santos (the “Application”) in the above adversary proceeding (the “Adversary Proceeding”). At the hearing, Judgment Plaintiffs appeared by and through their counsel of record. Francisca De Hoyos De Santos was represented at the hearing by counsel, but did not file a written response in opposition to the Application. Upon review and consideration of the pleadings in the Adversary Proceeding, the evidence admitted into the record at the hearing on the Application, and the arguments of counsel, the Court enters the following findings of fact and conclusions of law pursuant to Federal Rule of Civil Procedure 52, made applicable to the Adversary Proceeding by Federal Rule of Bankruptcy Procedure 7052.

I.

FINDINGS OF FACT

1. In October 1999, the Judgment Plaintiffs obtained a multi-million dollar judgment (the “Atlanta Judgment”) in the United States District Court for the Northern District of Georgia, Atlanta Division (the “Atlanta Action”) against certain of the defendants in this Adversary Proceeding including Ignacio Santos de Hoyos, Amir Virani, and certain companies under their control including Sanvir Development, Inc. (“Sanvir”), Signa Development Corporation (“Signa”), and Atlanta Associates, Inc. *See* Plaintiffs’ Exhibit 5.

The 1999 Signa Transfer

2. On the day the jury returned its verdict in the Atlanta Action, Amir Virani initiated the sale of certain real property owned by Signa (the “Deer Pointe Property”) for in excess of \$6.6 million (the “Deer Pointe Transaction”). The sale closed immediately prior to the entry of the Atlanta Judgment and payment was made by cashier’s checks in favor of Signa. Acting on Signa’s behalf, Ignacio Santos de Hoyos and Amir Virani endorsed these cashier’s checks to several individuals and entities, including other defendants in this Adversary Proceeding. The Judgment Plaintiffs contend that the Deer Point Property was worth substantially more than the \$6.6 million purchase price and, *inter alia*, that the Deer Point Property was sold with the actual intent to hinder, delay and defraud the Judgment Plaintiffs who were about to become judgment creditors of Signa.

3. Through a series of intermediate transfers described below, the proceeds of one of the cashier’s checks from the Deer Pointe Transaction were deposited into a Citibank account of Francisca de Hoyos de Santos, the mother of Ignacio Santos de Hoyos. This cashier’s check

made payable to Signa in the amount of \$1,938,271.69 was first endorsed over to one of the other defendants in this Adversary Proceeding, Sanisca Investments, S.A. de C.V. (“Sanisca”). Ignacio Santos de Hoyos and Amir Virani endorsed the cashier’s check on Signa’s behalf. In turn, Sanisca immediately endorsed the check over to another defendant in this Adversary Proceeding, Sonia Santos de Trevino (a daughter of Ignacio Santos de Hoyos). Again, Ignacio Santos de Hoyos endorsed the cashier’s check on Sanisca’s behalf. *See* Plaintiffs’ Exhibit 7. Sonia Santos de Trevino then deposited the check into a bank account she and her mother, Sonia Villareal de Santos (who is the wife of Ignacio Santos de Hoyos and is another defendant in this Adversary Proceeding), controlled. *See* Plaintiffs’ Exhibits 7 and 8. Immediately thereafter, Sonia Santos de Trevino wrote a check for \$2,480,000.00 to yet another defendant in this Adversary Proceeding, Contenedores IEM (an entity allegedly controlled by Igancio Santos de Hoyos), which was deposited into a Contenedores IEM bank account. *See* Plaintiffs’ Exhibits 14 and 15. Thereafter, Contenedores IEM, on the authority of Ignacio Santos de Hoyos and Pedro L. Gutierrez (another defendant in this Adversary Proceeding) transferred \$1,930,000.00 (almost exactly the amount of the original cashier’s check) to a Citibank account in the name of Francisca de Hoyos de Santos. *See* Plaintiffs’ Exhibits 16 and 24. Shortly thereafter, Francisca de Hoyos de Santos transferred \$1,917,000.00 from this Citibank account out of the country, first to Banco Santander New York and then to Banco Santander Mexicano, S.A. *See* Exhibit 24.

4. Immediately after the Judgment Plaintiffs learned of the Deer Pointe Transaction, they filed suit in Texas state court to recover the property they contended had been fraudulently transferred in violation of the Texas Uniform Fraudulent Transfer Act, TEX. BUS. COM. CODE

§ 24.001, *et seq.* (West 1987) (the “Act”).¹ The state court entered temporary restraining orders and, later, temporary injunctions regarding the proceeds of the Deer Pointe Transaction. *See* Plaintiffs’ Exhibits 12 and 13. One of the temporary injunctions, entered January 21, 2000, ordered that Ignacio Santos de Hoyos, Sonia Santos de Trevino, Sanisca, Amir Virani, and Tres Vidas Investments, Ltd., “along with their officers, employees, directors, shareholders, agents, partners, joint venturers, and all those persons acting in concert with all or any of the aforesaid, together with those persons having actual knowledge of this Court’s order, are hereby restrained and enjoined until further order of the court” from, *inter alia*, “[t]ransferring any funds in the United States to any location outside of the United States” and “transferring in any manner, any proceeds of the Deer Pointe Transaction” *See* Plaintiffs’ Exhibit 13.² The injunction further ordered an accounting of the “disposition of any proceeds of the Deer Pointe Transaction and the present location of such proceeds.” *See id.*

5. In February 2000, when the Judgment Plaintiffs discovered the transfers which ultimately put some of the proceeds of the Deer Pointe Transaction in the hands of Francisca de Hoyos de Santos, they added her and other parties as defendants and obtained an order garnishing Francisca de Hoyos de Santos’ Citibank account. *See* Plaintiffs’ Exhibit 23. However, Francisca de Hoyos de Santos had already transferred most of the funds out of the country, *see* Plaintiffs’

¹On April 6, 2000, Defendant Amir Virani filed his voluntary petition under title 11, chapter 7 of the United States Bankruptcy Code. On June 1, 2000, Plaintiffs removed the Texas state court fraudulent transfer action to this Court, which suit is defined herein as the Adversary Proceeding.

²The transfer of \$1,917,000.00 by Francisca de Hoyos de Santos from her Citibank account to Banco Santander Mexicano, S.A. may be in violation of the Texas state court’s temporary injunction order. *See* Plaintiffs’ Exhibit 13.

Exhibit 24, and the Judgment Plaintiffs were able to garnish only the \$47,296.41 that remained in the Citibank account. *See id.*

The 1997 Santos Transfer

6. In June 2000, the Judgment Plaintiffs took the deposition of Ignacio Santos de Hoyos in furtherance of their collection efforts. In that deposition, Ignacio Santos de Hoyos was asked about a document that appeared to show that he had maintained an account at Texas Commerce Bank, n/k/a Chase Bank, which had never been disclosed in response to the Judgment Plaintiffs' prior discovery requests. Ignacio Santos de Hoyos denied the existence of that account. *See* Plaintiffs' Exhibits 2 and 25.

7. In July 2000, the Judgment Plaintiffs obtained documents from Chase Bank which showed that Ignacio Santos de Hoyos had opened an account at Texas Commerce Bank, n/k/a Chase Bank, in May 1997 and that he had transferred over \$8,400,000.00 from that account to his mother's (Francisca de Hoyos de Santos') account at Lehman Brothers that same year. *See* Plaintiffs' Exhibit 2.

8. The timing of these transfers to his mother is significant under the Act. The Judgment Plaintiffs threatened Ignacio Santos de Hoyos with the filing of the Atlanta Action in 1997 unless monies were repaid to them voluntarily. Ignacio Santos de Hoyos apparently persuaded the Judgment Plaintiffs that they needed additional time to discuss settlement and the Judgment Plaintiffs agreed not to file suit until after May 9, 1997. *See* Plaintiffs' Exhibit 1. On May 19, 1997, Ignacio Santos de Hoyos transferred \$8,399,733.99 from his Texas Commerce Bank, n/k/a Chase Bank, account to his mother's Lehman Brothers account. *See* Plaintiffs' Exhibits 2 and 3. An additional \$7,973.32 was so transferred on October 1, 1997. *See id.*

9. When the Judgment Plaintiffs learned of these transfers in July 2000, they obtained a garnishment order from the United States District Court for the Northern District of Texas, Dallas Division, dated August 11, 2000 for Francisca de Hoyos de Santos' Lehman Brothers account.³ *See* Plaintiffs' Exhibit 26. No monies were garnished, however, as Francisca de Hoyos de Santos had closed her Lehman Brothers account in February 2000, a few days after she had been added as a defendant to this action. *See* Plaintiffs' Exhibit 4. In all, Francisca de Hoyos de Santos transferred over \$28,000,000 in cash and securities from her Lehman Brothers account to Union Bancaire Privée in Switzerland. *See id.*

10. Any Finding of Fact may also be deemed a Conclusion of Law.

II.

CONCLUSIONS OF LAW

1. This Court has jurisdiction over this dispute in accordance with 28 U.S.C. §§ 157 and 1334. The Adversary Proceeding and the relief sought in the Application are core proceedings in accordance with 28 U.S.C. § 157(b)(2).

2. In the State of Texas, fraudulent transfers are governed by the Act. Under the Act, a transfer is deemed fraudulent to a creditor if:

³In January 2000, the Judgment Plaintiffs registered the Atlanta Judgment in the United States District Court for the Northern District of Texas and filed Applications for Turnover, for Appointment of Receiver and for Injunctive Relief in Aid of Enforcement of Judgment against Signa, Sanvir, Atlanta Associates, Inc., Amir Virani, and Ignacio Santos de Hoyos in Civil Action No. 3-00-MC0001-H, *Jose Maiz, et al. v. Amir Virani, et al.*, (Sanders, J.). In that case, the Court entered a Turnover Order against, and appointed a Receiver for, Ignacio Santos de Hoyos. *See id.*

- a. The transfer was made with actual intent to hinder, delay, or defraud any creditor of the debtor,⁴ *see* TEX. BUS. COM. CODE § 24.005(a)(1) (West 1993);
 - b. The transfer was made without receiving a reasonably equivalent value in exchange for the transfer, and the debtor was insolvent at the time of the transfer or became insolvent as a result of the transfer, *see* TEX. BUS. COM. CODE § 24.006(a) (West 1987); or
 - c. The transfer was made to an insider⁵ for an antecedent debt, the debtor was insolvent at the time of the transfer, and the insider had reasonable cause to believe that the debtor was insolvent. *See* TEX. BUS. COM. CODE § 24.006(b) (West 1987).
3. In determining the existence of actual intent to hinder, delay, or defraud, the Act identifies several factors, or “badges of fraud,” that should be considered – including whether:
- a. The transfer was to an insider, *see* TEX. BUS. COM. CODE § 24.005(b)(1) (West 1993);
 - b. The debtor retained possession or control of the property transferred after the transfer, *see* TEX. BUS. COM. CODE § 24.005(b)(2) (West 1993);
 - c. The transfer was concealed, *see* TEX. BUS. COM. CODE § 24.005(b)(3) (West 1993);

⁴Under the Act, “debtor” is defined as a person who is liable on a claim. *See* TEX. BUS. COM. CODE § 24.002(6) (West 1993).

⁵Under the Act, “insiders” include relatives of the debtor. *See* TEX. BUS. COM. CODE § 24.002(7)(A)(i) (West 1993).

- d. Before the transfer was made, the debtor had been sued or threatened with suit, *see* TEX. BUS. COM. CODE § 24.005(b)(4) (West 1993);
 - e. The transfer was of substantially all of the debtor's assets, *see* TEX. BUS. COM. CODE § 24.005(b)(5) (West 1993);
 - f. The debtor removed or concealed assets, *see* TEX. BUS. COM. CODE § 24.005(b)(7) (West 1993);
 - g. The debtor was insolvent or became insolvent shortly after the transfer was made, *see* TEX. BUS. COM. CODE. § 24.005(b)(9) (West 1993); and
 - h. The transfer occurred shortly before or shortly after a substantial debt was incurred. *See* TEX. BUS. COM. CODE. § 24.005(b)(10) (West 1993).
4. If successful in establishing a transfer in violation of the Act, a creditor may recover judgment for the value of the asset transferred or the amount necessary to satisfy the creditor's claim, whichever is less. *See* TEX. BUS. COM. CODE § 24.009(b) (West 1993). The Act specifically authorizes the issuance of an injunction against the transferee to prevent the further disposition of the property at issue. *See* TEX. BUS. COM. CODE. § 24.008(a)(3)(A) (West 1987).
5. Federal courts can issue preliminary injunctions, *see* FED. R. CIV. P. 65 (made applicable here by Bankruptcy Rule 7065), which will preserve the status quo or the "relative positions of the parties until a trial on the merits can be held." *See Wenner v. Texas Lottery Comm'n*, 125 F.3d 321, 326 (5th Cir. 1997) (quoting *University of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)); *see also Opticians Assoc. of Am. v. Independent Opticians of Am.*, 920 F.2d

187, 197 (3rd Cir. 1990) (observing that preliminary injunctions favor the status quo pending a full hearing).

6. A preliminary injunction may only be granted if the movant establishes (i) a substantial likelihood of success on the merits; (ii) a substantial threat that the movant will suffer irreparable injury if the injunction does not issue; (iii) that the threatened injury to the movant outweighs any damage the injunction may cause; and (iv) that the injunction will not disserve the public interest. *See Sugar Busters, L.L.C. v. Brennan*, 177 F.3d 258, 264 (5th Cir. 1999); *Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir. 1998). An injury may be irreparable if “it is shown that a money judgment will go unsatisfied absent equitable relief.” *See Enterprise Int’l, Inc. v. Corporacion Estatal Petrolera Ecuatoriana*, 762 F.2d 464, 473 (5th Cir. 1985) (“The absence of an available remedy by which the movant can later recover money damages, however, may also be sufficient to show irreparable injury.”); *Pipkin v. JVM Operating, L.C.*, 197 B.R. 47, 55 (E.D. Tex. 1996) (“A theoretical right to recover money damages will not constitute an adequate legal remedy where difficulties in the collection of any judgment render that remedy illusory.”) (quoting *Winston v. General Drivers Local 89*, 879 F.Supp 719, 725 (W.D. Ky 1995); *Collins v. Aggreko, Inc.*, 884 F. Supp. 450, 452 (D. Utah 1995) (“Irreparable harm could result if defendants will be unable to pay damages.”)).

7. The Court concludes that the standards for the issuance of a preliminary injunction are satisfied here. First, the Judgment Plaintiffs are likely to succeed on the merits of their claim that Signa, with the assistance of other defendants, fraudulently transferred the proceeds of the Deer Pointe Transaction and that Francisca de Hoyos de Santos is a transferee of \$1,930,000.00 of these fraudulently transferred funds. The Judgment Plaintiffs are also likely to

succeed on the merits of their claim that Ignacio Santos de Hoyos fraudulently transferred \$8,399,733.99 in May 1997, and \$7,973.32 in October 1997, from his account at Texas Commerce Bank, n/k/a Chase Bank, to his mother's account at Lehman Brothers and that Francisca de Hoyos de Santos is the transferee of these fraudulently transferred funds.

8. Second, the Judgment Plaintiffs will suffer an irreparable injury if a preliminary injunction is not granted. Francisca de Hoyos de Santos transferred the funds she received from the Deer Pointe Transaction and the funds her son transferred to her from an account he denied having out of the country (to Mexico and Switzerland, respectively) shortly after she was sued in this action. Unless restrained, Francisca de Hoyos de Santos is likely to further transfer these funds in what appears to be an attempt to conceal the funds from the Judgment Plaintiffs and to frustrate their efforts to recover if successful after a trial on the merits of the Adversary Proceeding.

9. Third, the harm to the Judgment Plaintiffs in the absence of an injunction substantially outweighs any harm that would be suffered by Francisca de Hoyos de Santos as a result of the entry of an injunction pending a trial on the merits. If Francisca de Hoyos de Santos needs to use the funds or desires to invest them in a different fashion pending trial, the Court can consider those requests and needs as they arise.

10. Finally, the public interest is not disserved by the entry of a preliminary injunction against Francisca de Hoyos de Santos. Since it appears that property was transferred to Francisca de Hoyos de Santos in violation of the Act, enjoining her further disposition of that property pending a trial on the merits will serve the public interest and is specifically authorized by the Act. *See* TEX. BUS. COM. CODE. § 24.008(a)(3)(A) (West 1987).

11. Thus, in accordance with the Act, Fed. R. Civ. P. 65, and the equitable powers of this Court, the Court will: (i) enjoin Francisca de Hoyos de Santos from transferring the proceeds she received from the Deer Pointe Transaction (the \$1,930,000.00 deposited into her Citibank account and then transferred by her to Banco Santander Mexicano, S.A.) from their current location(s) without further Order of the Court; (ii) enjoin Francisca de Hoyos de Santos from transferring the funds she received from her son's (Ignacio Santos de Hoyos') account at Texas Commerce Bank, n/k/a/ Chase Bank (the aggregate sum of \$8,407,707.31 – initially deposited into her Lehman Brothers account and then transferred by her to Union Bancaire Privée in Switzerland) from their current location(s) without further Order of the Court; and (iii) order Francisca de Hoyos de Santos to file with the Court a detailed accounting of the \$10,290,410.90 in transferred funds – that amount representing the proceeds from the Deer Pointe Transaction (\$1,930,000.00), plus the funds from the Texas Commerce Bank, n/k/a/Chase Bank, account of Ignacio Santos de Hoyos (\$8,399,733.99 and \$7,973.32), minus the amount the Judgment Plaintiffs garnished in Francisca de Hoyos de Santos' Citibank account (\$47,296.41) – and disclosing the present location of such funds.⁶

12. Any Conclusion of Law may also be deemed a Finding of Fact.

⁶The Judgment Plaintiffs also seek a mandatory injunction directing that Francisca de Hoyos de Santos return these funds to the United States and maintain them here pending a trial on the merits. This mandatory injunctive relief remains under advisement. The Court will issue a supplemental order and supplemental findings of fact and conclusions of law with respect to this request if it is granted.

An Order Granting Preliminary Injunction consistent with these Findings of Fact and Conclusions of Law will be entered separately.

Signed this 30th day of January, 2001.

Barbara J. Houser
United States Bankruptcy Judge